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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

In re METROPOLITAN SECURITIES
LITIGATION

No. CV-04-0025-FVS

THIS DOCUMENT RELATES TO:
ALL ACTIONS

PLAINTIFFS' MEMORANDUM
IN SUPPORT OF MOTION *IN*
LIMINE TO EXCLUDE
EVIDENCE RELATED TO
INVESTOR RELIANCE ON
BROKER REPRESENTATIONS

Hearing Date: March 3, 2010
Time: 9:00 a.m.

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STATUTES

15 U.S.C. § 77	<i>passim</i>
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I. INTRODUCTION

As the Court is aware, the upcoming trial in this case will concern Plaintiffs' claim against PwC, pursuant to Section 11, that the Metropolitan Group's FY 2000 financial statements were materiality misstated. Under Section 11, it is irrelevant whether an investor did or did not rely on the alleged misrepresentations.

Despite that legal reality, PwC has made clear, through its deposition designations and its proposed trial exhibits, that it has every intention of turning the impending trial into a debate about what investors in Metropolitan and Summit securities subjectively believed about the safety of the securities at the time they purchased them.

Unfortunately for PwC, what investors knew or did not know or believed or felt or thought or were even told about these securities before purchasing them is entirely irrelevant. Plaintiffs therefore move to exclude argument, documents, and testimony that is offered on the issue of what Plaintiffs and other Class members might have believed or been told about the securities before they purchased them.

II. THE EVIDENCE SUBJECT TO THIS MOTION

The evidence that PwC has designated which bears on what investors were, or might have been, told about Metropolitan and Summit securities runs a wide gamut. The following is a summary of the major categories of evidence PwC seeks to introduce on this issue:

1. Evidence of how the securities were marketed to investors.

2. Evidence of surveys of investors as to their perceptions of Metropolitan and Summit securities.
3. Evidence of investigations of the sole dealer of these securities, Metropolitan Investment Securities (MIS), by various organizations.
4. Evidence of findings made against MIS and its head, Ronald Pellegrino, regarding the marketing and sale of the securities.
5. Evidence that Class members, including some Lead Plaintiffs, purchased securities from PJ Sears-Million and William Sears, who have served time in federal prison after being charged with misrepresenting the safety of Metropolitan and Summit securities.
6. Evidence that Class members, including some Lead Plaintiffs, sued their brokers for misrepresenting securities to investors.
7. Evidence that brokers were sanctioned by governmental agencies for their representations to investors about these securities.
8. Evidence of what brokers reported about their difficulty selling certain securities.
9. Evidence of presentations to brokers by hired consultants.
10. Evidence of conversations some of the Lead Plaintiffs had with investigators of both MIS and PJ Sears-Million.
11. Evidence as to whether Class members subjectively believed that the securities were high-risk.

This may not be an exhaustive list of the sort of evidence or testimony PwC wishes to present or elicit at trial, but it is representative. Plaintiffs have specifically objected to designated exhibits and deposition testimony related to these issues, as covered in prior briefing. Ct. Recs. 969 and 979. However, given PwC's obvious intent to bury the jury with irrelevant and prejudicial evidence about investor communications and understandings regarding their securities

1 purchases, Plaintiffs hereby move for a broad directive from the Court that
 2 evidence and argument about that issue has no place in this trial.

3 III. ARGUMENT

4 A. Evidence of Investors' Reliance or Understanding Is Irrelevant Under 5 Section 11

6 The only claim that will be tried against PwC in this case is pursuant to
 7 Section 11, 15 U.S.C. § 77k. As the Supreme Court has described Section 11
 8 claims generally:
 9

10 Section 11 of the 1933 Act allows purchasers of a
 11 registered security to sue certain enumerated parties in a
 12 registered offering when false or misleading information
 13 is included in a registration statement. The section was
 14 designed to assure compliance with the disclosure
 15 provisions of the Act by imposing a stringent standard of
 16 liability on the parties who play a direct role in a
 17 registered offering. *If a plaintiff purchased a security
 issued pursuant to a registration statement, he need only
 show a material misstatement or omission to establish his
 prima facie case. Liability against the issuer of a security
 is virtually absolute, even for innocent misstatements.*

18 *Herman & Maclean v. Huddleston*, 459 U.S. 375, 381-82 (1983) (emphasis added).

19 As the Ninth Circuit has put it, “[t]he plaintiff in a § 11 claim must demonstrate (1)
 20 that the registration statement contained an omission or misrepresentation, and (2)
 21 that the omission or misrepresentation was material, that is, it would have misled a
 22 reasonable investor about the nature of his or her investment.” *In re Daou Sys.*,
 23 411 F.3d 1006, 1027 (9th Cir. 2005).

24 There is no element of a Section 11 claim that requires a plaintiff to prove
 25 that she relied on, or even read or was aware of, the representation that she claims
 26

1 was false or misleading. Nor does reliance, or a plaintiff's subjective
 2 understanding or belief, constitute any portion of any defense available to PwC
 3 under Section 11. As the Third Circuit recently stated:

4 [R]eliance is *not* an element under § 11. As the District
 5 Court noted, because reliance is not an element under §
 6 11, "the conduct of the defendants, not the knowledge of
 7 the plaintiffs, is determinative" of materiality. ... The
 8 crucial questions are: "[W]as there a misrepresentation?
 9 And, if so, was it objectively material?" ... Since
 10 reliance is irrelevant in a § 11 case, a § 11 case will never
 11 demand individualized proof as to an investor's reliance
 12 or knowledge

13 *See In re Constar Int'l Inc. Sec. Litig.*, 585 F.3d 774, 784 (3d Cir. 2009) (emphasis
 14 in original) (citations omitted). This Court has previously recognized this same
 15 principle, in this case. *See In re Metro. Secs. Litig.*, 532 F. Supp. 2d 1260, 1270
 16 (E.D. Wash. 2007) (no reliance required under section 11 when purchases are not
 17 after-market purchases; following later certification, after-market purchases are
 18 excluded from the Class). *See also* 15 U.S.C. § 77k(a) (investor reliance is *only*
 19 relevant under section 11 when purchases were more than one year after issuance
 20 of registration statement); *Alpern v. UtiliCorp United*, 84 F.3d 1525, 1541 (8th Cir.
 21 1996) ("A claim under § 11 does not require proof of reliance, causation, or
 22 scienter, but only materiality and damages."); *In re: HealthSouth Corp. Secs.*
 23 *Litig.*, 2009 U.S. Dist. LEXIS 90607, at *106 (N.D. Ala. Sept. 30, 2009) ("a
 24 plaintiff in a Section 11 case does not need to prove reliance; the statute presumes
 25 that one whose purchase of a security can be traceable to a registration statement
 26 containing a misrepresentation would have relied on that registration statement.").

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1 PwC should not be allowed to present argument to the jury, nor introduce
2 evidence or testimony, which suggests or implies that some or all of the Lead
3 Plaintiffs or the Class members were duped or misled into investing in
4 Metropolitan and Summit securities because they thought they were safe
5 investments. All of the evidence outlined in Section II of this brief serves no
6 purpose other than to suggest that Class members relied on broker's
7 misrepresentations, rather than the registration statements and the accompanying
8 financial statements. Such evidence is not admissible.

10 Plaintiffs addressed many evidence-specific issues in their briefs in support
11 of their objections to Defendants' exhibits and their objections. Ct. Rec. 967,
12 Appendices C, E, and T; Ct. Rec. 969. As addressed in that briefing, many of the
13 specific exhibits also raise issues of hearsay and character evidence.

15 In addition, as noted in Ct. Rec. 969, Appx. C, there is a very narrow
16 category of evidence potentially bearing on investor communications that Plaintiffs
17 have not objected to. Plaintiffs do not object to mention or evidence which simply
18 states certain objective facts: that an NASD investigation was commenced in the
19 fall of 2002, that the NASD subsequently issued a "Wells" letter in June 2003
20 informing MIS of likely sanctions, that the NASD encouraged MIS in July 2003 to
21 close its internal "trading desk," and that following its investigation, the NASD
22 sanctioned MIS in October 2003 and required its closure pending satisfaction of
23 certain conditions. These facts, and the timing and nature of their disclosure to the
24 public, are relevant to PwC's causation theory. While Plaintiffs disagree with the
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1 theory, they do not object to the basic admission of testimony or evidence
2 regarding those specific facts.

3 However, Plaintiffs object to all other argument, evidence, or testimony
4 regarding or related to what investors knew, thought, believed, or did not know
5 about Metropolitan and Summit securities.
6

7 **B. PwC Cannot Back-Door the Evidence by Arguing it Bears on the**
8 **Materiality of Any Misrepresentation**

9 PwC has attempted, and will likely continue to attempt, to argue that
10 individual investors' perception of Metropolitan Securities is nonetheless
11 admissible as evidence of whether the alleged misrepresentations in the financial
12 statements were material. However, the argument falls apart – it would essentially
13 amount to an argument that the financials were not as “material” as what investors
14 might have heard from the brokers about their investments. This is nothing more
15 than a reliance argument in disguise, and should not be allowed.
16

17 In addition as the Ninth Circuit has stated, the test of materiality under
18 section 11 is whether “it would have misled a *reasonable* investor about the nature
19 of his or her investment.” *Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156, 1161
20 (9th Cir. 2009) (emphasis added). This test, like any test concerning
21 reasonableness, is *objective*. *Caravan Mobile Home Sales, Inc. v. Lehman Bros.*
22 *Kuhn Loeb, Inc.*, 769 F.2d 561, 565 (9th Cir. 1985). Therefore, attempts to prove
23 that a particular person would or would not have found particular information
24 material in light of what his broker might have told him, is simply not probative of
25 whether the alleged representations and omissions at issue were *objectively*
26

1 reasonable. The jury can, and must, consider the objective reasonableness without
2 evidence of subjective understanding.

3 In their response to Plaintiffs' objections to their exhibits, Ct. Rec. 1003,
4 PwC repeatedly cites to *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438 (1976) to
5 support the argument that what brokers told investors is relevant because it is part
6 of the "total mix" of information bearing on materiality. The case does not help
7 their cause. First, it does not address Section 11. Second, *TSC* defines the
8 materiality standard in terms of objective *reasonableness*: "an omitted fact is
9 material if there is a substantial likelihood that a reasonable shareholder would
10 consider it important"¹ What a particular person did or did not subjectively
11 know or believe is not relevant to that determination.
12

13
14 In addition, whatever relevance this evidence might have to objective
15 materiality (and Plaintiffs believe there is none), it is clearly outweighed by the
16 risk that the jury will be confused or misled about whether Plaintiffs must prove
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18 ¹ The other cases PwC cited in its responses to exhibit objections for its
19 materiality arguments similarly set forth objective standards of reasonableness.
20 *See In re Donald J. Trump Casino Sec. Litig.*, 7 F.3d 357, 369 (3d Cir. 1993) ("an
21 omitted fact is material if there is a substantial likelihood that a reasonable
22 [investor] would consider it important in deciding how to [act]."); *Parnes v.*
23 *Gateway 2000, Inc.*, 122 F.3d 539, 547 (8th Cir. 1997) (assessing statements from
24 the objective standpoint of a "reasonable investor").
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1 reliance, when it is clear that reliance (or the lack of it) is not an element of the
2 claim or any defense under Section 11. Any attempts to back-door investor
3 knowledge (or lack of it) as bearing on materiality must be barred under Fed. R.
4 Evid. 403.

5
6 **C. The Evidence Is Not Relevant to the Negative Causation Defense**

7 PwC argues, Ct. Rec. 1003 at 13-15, that *all* evidence regarding *all* details of
8 the NASD, SEC, and DFI investigations are necessary to establish its loss-
9 causation defense. They make the same argument with regard to the investigation
10 and conviction of PJ Sears-Million. *Id.* at 27. PwC is wrong. The only tie that
11 PwC makes to the NASD investigation of MIS and Plaintiffs' loss in damages is
12 that (1) Roth withdrew its pricing opinion in June 2003 allegedly in part due to the
13 then-ongoing NASD investigation, (2) the NASD investigation and sanctions were
14 disclosed to the public, and (3) that the sanctions prohibited MIS from selling
15 securities. Plaintiffs do not object to discussion or evidence of these specific facts.
16 But the full details and background of the investigation, and all of the evidence
17 PwC wants to introduce that was covered in the investigation, is not necessary to
18 prove those facts and will unfairly prejudice Plaintiffs by misleading and confusing
19 the jury as to the issue of reliance. PwC has no argument that what a particular
20 broker said to a particular person, or what was said among various Metropolitan
21 employees about investor impressions of the registration statement, has any
22 bearing at all on their negative causation defense. Nor are Plaintiffs going to argue
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1 at trial that the NASD investigation was in any way related to the accounting
2 misrepresentations.

3 PwC's causation argument is, moreover, entirely specious as to the SEC and
4 DFI investigations, which did not prevent MIS from selling securities, were never
5 disclosed to the public during the relevant time frame, and had no bearing on the
6 liquidity of the companies or on Plaintiffs' losses.

7
8 PwC's causation argument as to evidence of the PJ Sears-Million
9 investigation and guilty plea does not even pass the giggle test. The fact that Lead
10 Plaintiff Bodner completed an NASD questionnaire about what the Sears told him
11 does not "make it more likely that the NASD investigation caused Roth to
12 withdraw its pricing opinions" (*id.* at 27) – the two are not even plausibly related.
13 Similarly, interviews of Lead Plaintiffs by the U.S. Dept. of Justice about the Sears
14 do not "support the fact that MIS broker misconduct ... caused [the NASD] to
15 intervene at MIS." *Id.* The DOJ did not intervene at MIS – the NASD did. And
16 the interviews were in 2004 and 2005; MIS ceased to exist in 2003. And Plaintiffs
17 cannot even fathom PwC's argument that PwC's causation defense is "made more
18 probable" by Mr. Sears' guilty plea about what he told an investor in 2002, *see id.*
19 – it has nothing to do with public disclosures, the collapse of the companies, the
20 loss in value of the securities, or the NASD investigation of MIS. The evidence
21 regarding the Sears investigation and pleas are flatly objectionable.
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D. The Evidence is Not Relevant to Witness Credibility

PwC has also argued, Ct. Rec. 1003 at 17, that what a particular Lead Plaintiff may have previously said about his or her broker is somehow relevant to their credibility in this case. PwC apparently assumes the Lead Plaintiffs will testify as to who they believe caused the loss in the value of their securities. They will not do so, and in fact are not qualified to do so. That is the province of the experts in this case, and even if the Lead Plaintiffs had a personal opinion as to loss causation, it would likely be inadmissible. Nor can PwC point to any statement in which any of the Lead Plaintiffs stated that they believed that the auditors did nothing wrong, or that the auditors are not liable at all for the loss in the securities value. There will be nothing to properly impeach the Lead Plaintiffs with.

E. Plaintiffs Bizzell, Webber Romero, and Wilkey Will Not Pursue Their WSSA Claims at Trial

While reliance is relevant to WSSA claims, the Lead Plaintiffs who have individual claims under WSSA will not be pursuing them at trial. The Lead Plaintiffs who stated individual WSSA claims have decided to dismiss them.

IV. CONCLUSION

For the reasons stated above, Plaintiffs request that the Court issue an order excluding all argument, documents, and testimony offered on the issue of what Lead Plaintiffs and other Class members might have believed or been told about the securities before they purchased them.

1 Dated this 16th day of February, 2010.

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CERTIFICATE OF SERVICE

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